IN THE

# Supreme Court of the United States

OCTOBER TERM, 1948.

## No. 548

BROTHERHOOD OF RAILROAD TRAINMEN,
*Petitioner,*

*vs.*

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.,
*Respondents.*

## BRIEF OF THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., PLAINTIFFS-RESPONDENTS, IN OPPOSITION TO PETITION OF BROTHERHOOD OF RAILROAD TRAINMEN, INTERVENING DEFENDANT, FOR WRIT OF CERTIORARI.

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March 11, 1949.

THE GUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

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## STATEMENT OF THE CASE.

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It is believed that a more complete statement of the case than has been afforded by the petitioner will be of assistance to the Court.

### The Complaint of Plaintiffs-Respondents (R. 2-47).

As shown by the complaint herein (R. 2-12), this suit was brought under Section 16 (12) of the Interstate Commerce Act (49 U. S. C. A. Sec. 16, Par. 12) to enjoin disobedience of a condition in an order of the Interstate Commerce Com-

mission (hereinafter called the Commission) entered May 16, 1922, in the *Chicago Junction Case*, 71 I. C. C. 631.

Plaintiffs-Respondents (hereinafter referred to as plaintiffs) are seven* trunk line carriers engaged, *inter alia*, in the transportation by railroad of carload shipments of livestock, other than hogs and sheep, from the Union Stock Yards, Chicago, Illinois, to destinations east and southeast of Chicago (R. 2, 3).

Defendants-Respondents (hereinafter referred to as defendants) are The New York Central Railroad Company, The Chicago River and Indiana Railroad Company and Chicago Junction Railway Company (hereinafter respectively referred to as the Central, the River Road and the Junction) (R. 2-3).

The Central is a trunk line carrier engaged, *inter alia*, in the same transportation as that of plaintiffs above referred to. The River Road is a switching line serving the Union Stock Yards, and all of its capital stock is now owned and was acquired by the Central on May 19, 1922, pursuant to authority granted by said order of May 16, 1922, on certain conditions. The Junction is a railroad company which on May 19, 1922, and on the same conditions, leased its entire railroad to the River Road for 99 years, and thereafter, at the option of the lessee, in perpetuity, which lease is still in effect (R. 3-5).

Said order of May 16, 1922, was entered on an application filed by the Central with the Commission on December 28, 1920. The Commission imposed various conditions upon its grant of authority in said order and provided that

* There were originally eight plaintiffs, but on June 7, 1947, the Pere Marquette Railway Company, one of the plaintiffs, was merged into The Chesapeake & Ohio Railway Company, another of the plaintiffs, and on April 29, 1948, the District Court directed that the cause proceed in the names of the remaining seven plaintiffs (R. 276).

*"subject to the observance of"** said conditions the acquisition by the Central of the capital stock of the River Road and the leasing to the River Road of the property of the Junction *"will be in the public interest"* (R. 25).

The third condition (71 I. C. C., p. 639), which is still in force, provided:

> "3. The present traffic and operating relationships existing between the Junction and River Road and all carriers operating in Chicago shall be continued, in so far as such matters are within the control of the Central." (R. 23.)

Prior to the Commission's order, the practice had been for the plaintiffs to use their own power and crews to move their empty and loaded livestock cars used in shipping livestock, other than hogs and sheep, from the Union Stock Yards, over the Junction tracks to and from the loading places in the Union Stock Yards. For the privilege of so moving their cars between their respective lines and said loading places, plaintiffs were charged $1.00 per car, loaded and empty (R. 4). Referring to this operating practice the Commission, in its report accompanying the order of May 16, 1922, said (71 I. C. C., p. 633):

> "All parties concede that that is the only practical method of handling that traffic." (R. 16.)

On January 25, 1946, the Central and the River Road notified plaintiffs that on and after February 1, 1946, plaintiffs would not be permitted to handle said cars as aforesaid, but cars destined for said loading places would have to be deposited by the plaintiffs at a point of interchange on the River Road lines, after which they would be moved by the River Road power and crews to the loading places, and after said cars were loaded, they would be moved by the River Road power and crews to a point of interchange on

* Emphasis ours throughout unless otherwise indicated.

the River Road lines from which point they could be picked up by the plaintiffs. Plaintiffs were further notified that the charge of the River Road for such handling would be $12.96 per outbound loaded car instead of the former charge of $1.00 per car, loaded or empty (R. 6-7).

The movement so required by the Central and the River Road on and after February 1, 1946, did not involve any fewer hours of service by the power and crews of the plaintiffs than had been required by the former movement (R. 8), resulted in substantial delay in placing cars for loading and in removing loaded cars, with the result that some shipments would require an additional unloading for rest, water and feeding to avoid violation of the law, and the ultimate delay so resulting would cause such shipments and other shipments moving in the same trains to miss the market for which they were intended (R. 9).

The change thus required by the Central and the River Road deprived plaintiffs of trackage rights over the line of the River Road to said Union Stock Yards and of direct access to said yards for the movement of the livestock in question, as a result of which plaintiffs had been and would be prevented from dealing directly with the shippers of such livestock in the placing, loading and removing of cars, in which activities they would be dependent upon the Central and the River Road for the performance of services to the shippers, with the result that the plaintiffs would no longer be able to see that the shippers received satisfactory service and so maintain their good will (R. 9-10).

On February 1, 1946, the Central and the River Road proceeded to act in accordance with said notice of January 25, 1946, and this suit was brought by the plaintiffs on February 12, 1946, to compel obedience to said Condition 3 in said order, it being alleged that the aforesaid action of the defendants was in violation of said condition (R. 7-12).

**Intervention by the Commission (R. 47-50).**

On February 21, 1946, the Commission filed its complaint of intervention, alleging that the action of the Central and the River Road in making the change in operations which is above outlined "constituted and was discontinuance in part of 'the present traffic and operating relationships existing between the Junction and River Road' and the plaintiffs herein" and was and is in violation of said order of May 16, 1922; that by Section 5 (8) of the Interstate Commerce Act (49 U. S. C. A. Section 5 (8)) the Commission was authorized to seek, and the district courts of the United States were given jurisdiction to afford, injunctive or mandatory relief to restrain violation of or compel obedience to an order issued under Section 5 of that Act, and asking that preliminary and permanent injunctions be entered restraining the violation of said order of May 16, 1922, and Condition 3 thereof.

**Stipulation of Facts (R. 51-58).**

For the purposes of a hearing on the motions for a preliminary injunction, the parties entered into a stipulation of facts, reciting the entry of the Commission's order and Condition 3 thereof, the operating practices obtaining prior to February 1, 1946, and the change brought about on said date as above set forth. The stipulation also recited that the Brotherhood of Railroad Trainmen, petitioner herein, bargaining agent for the River Road trainmen, having failed to settle certain disputes—among others a demand, claimed by said Brotherhood to be based upon a contract with the River Road, that River Road trainmen be given the work of moving and switching the livestock cars hereinabove referred to—notified the River Road under authority of an almost unanimous strike vote of said trainmen,

that unless said disputes were settled before 10:30 P. M., January 23, 1946, River Road trainmen would go out on strike at that hour. Under continued threat of such a strike the River Road shortly before the hour set for said strike made an agreement with said Brotherhood which, among other things, provided that said work of moving and switching livestock cars be given to River Road trainmen.

**The Preliminary Injunction (R. 59-68).**

On March 14, 1946 (R. 59), the District Court made findings of fact and conclusions of law and entered a preliminary injunction enjoining the defendants, "their respective officers, agents, representatives, employees and successors, and all other persons in active concert and participation with them," from failing and neglecting to obey said order of May 16, 1922, with respect to the transportation of livestock other than hogs and sheep from said Union Stock Yards, and from violating Condition 3 of said order in the like respect, and commanding them to permit plaintiffs to move their said cars over the line of the River Road as had been the practice prior to February 1, 1946 (R. 65-66).

**Answer of the River Road and the Central (R. 78-86).**

On May 6, 1946 (R. 78), the River Road and the Central filed a sworn answer (R. 84) in which, among other things, they denied that they or either of them "have violated Condition 3 or any other part of the report and order of the Interstate Commerce Commission of May 16, 1922," and denied "that Condition 3 * * * is applicable to or imposes any duty upon the defendant, River Road" (R. 81).

The answer also contained extended allegations concerning the dispute with the petitioner, representing the River Road trainmen, the strike threat, and settlement with peti-

tioner, which was summarized as aforesaid in the stipulation of facts.

**Intervention by Appellant.**

On March 18, 1946, petitioner's motion for leave to appear specially for the purpose of moving the court to vacate the preliminary injunction was denied (R. 70-71). On May 20, 1946 (R. 94), petitioner presented its petition to intervene as a defendant, which was denied on November 7, 1946. On direct appeal, this Court reversed the order denying intervention, holding that this suit was authorized by Section 16 (12) of the Interstate Commerce Act, and that petitioner had an absolute right to intervene under Section 17 (11) of that Act, because the interests of the River Road trainmen, whom it represented, would be affected, inasmuch as they would be bound by any judgment which might be entered in the case. *Railroad Trainmen* v. *B. & O. R. Co.*, 331 U. S. 519. Pursuant to the mandate of this Court, on September 26, 1947, the District Court permitted the petitioner to intervene.

**Motions of Petitioner on Intervening.**

On the day it intervened, petitioner filed its motions (1) to vacate the preliminary injunction, (2) to assess damages against plaintiffs for the wrongful issuance thereof, (3) for a summary judgment, and (4) for leave to answer the complaint if the motion for summary judgment was denied (R. 139-142).* The first and third of these motions require further notice.

Two grounds were assigned for the motion to vacate the preliminary injunction, both going to the jurisdiction of the

* These motions were identical with the motions which were tendered by petitioner with its petition to intervene on May 20, 1946 (R. 103-106, 139-142) and which were a part of the record on petitioner's appeal to this Court.

court. One ground was that the trainmen, engineers, firemen and enginemen of the River Road were indispensable parties in the absence of which the court lacked jurisdiction over the subject matter (R. 139). The other ground was that the suit involved a labor dispute, the plaintiffs had failed to comply with the Norris-LaGuardia Act, and the court, therefore, lacked jurisdiction to issue any injunction (R. 140-141).

Petitioner's motion for a summary judgment in its favor under Rule 56 (b) of the Rules of Civil Procedure was based upon two grounds. The first was an alleged lack of jurisdiction over the subject matter because of a failure to join as alleged indispensable parties engineers, firemen and enginemen employed by the River Road (R. 141). The second ground was for failure to state a claim upon which relief could be granted. Three reasons were assigned for this second ground. They were (1) failure of plaintiffs to comply with the Norris-LaGuardia Act; (2) the complaint did not allege a violation of the Commission's order; and (3) if it did allege such violation, then (a) the Commission did not have jurisdiction to issue the order, (b) 49 U. S. C. A. Section 5 (2) (f) was applicable and (c) the public interest required that no injunction issue (R. 141-142).

Attached to said motions was an affidavit by one of petitioner's officers (R. 142-148) alleging various matters apparently designed to form the basis for an argument that the claim of the River Road trainmen to do the switching work in question had its origin in an agreement which antedated the Commission's order and that properly construed Condition 3 of the order was not violated by the change in operations which was enjoined. In reply the plaintiffs filed counter affidavits and evidence (R. 162-186), which were followed by additional affidavits by petitioner (R. 188-198),

and then by further affidavits and evidence on the part of the plaintiffs (R. 198-222).*

Three days after intervening and filing the aforesaid motions, petitioner filed its motion to require plaintiffs to give an additional bond for not less than $100,000 conditioned as required by the Norris-LaGuardia Act to guarantee the River Road trainmen, firemen and engineers against loss from the wrongful issuance of said injunction and to secure their attorneys' fees (R. 158-160).

On February 26, 1948, the District Court entered an order overruling the motion to vacate the preliminary injunction and the motion for summary judgment but directing that plaintiffs give an additional bond in the sum of $25,000 conditioned upon the payment of such damages as the River Road trainmen might be found to have sustained after October 13, 1947, due to the issuance of said preliminary injunction, if it should be found that such injunction was wrongfully issued (R. 260-261).

**Petitioner's Appeal to the Circuit Court of Appeals, and the Issues There Decided.**

On March 25, 1948, petitioner filed its notice of appeal "from so much of the order * * * as denies the motion of the Brotherhood of Railroad Trainmen to vacate and dissolve the preliminary injunction and from so much of said order * * * as requires the plaintiffs to file their bond only

* While of no particular pertinence in connection with the questions now before this Court, we wish to make the point that factual statements, particularly on pages 2 and 3 of the petition, relative to the switching work claimed to have been done by the River Road trainmen prior to February 1, 1946, and the length of time they had been urging the right to do all such work, based on record references to said affidavits, are not conceded by plaintiffs. If, at any stage of this case, it should be held that such matters are pertinent, they can only be tried on a hearing on the merits and not on affidavits filed in connection with a motion for summary judgment.

in the sum of $25,000 and conditioned as provided in said order" (R. 261-262). On November 11, 1948, the United States Court of Appeals affirmed the judgment of the District Court (R. 294).

In its opinion (R. 285-293) it held that the Norris-LaGuardia Act was not applicable to this suit (R. 288-291), that the River Road trainmen, engineers, firemen, and enginemen were not indispensable parties (R. 291-292), that the District Court was not required to make findings of fact and conclusions of law in overruling petitioner's motion to vacate the preliminary injunction, and that since the Norris-LaGuardia Act was not applicable to the suit the District Court did not err in failing to require respondents to file a Norris-LaGuardia Act bond (R. 293).

The court thus held against the petitioner on the two jurisdictional points raised by its motion to vacate the preliminary injunction. It ruled that the other points, which were raised by the petitioner's motion for a summary judgment, were not before it, stating that the proper time to consider them is upon a trial of the merits, when petitioner might avail itself of any defense it might have (R. 293).

## SUMMARY OF ARGUMENT.

### I.

### THE UNITED STATES COURT OF APPEALS DECIDED ALL QUESTIONS BEFORE IT AND PROPERLY REFUSED TO CONSIDER ISSUES NOT PRESENTED BY PETITIONER'S APPEAL.

The Court of Appeals decided three questions, namely: (1) that the Norris-LaGuardia Act is not applicable to this suit, (2) that River Road employees are not indispensable parties, and (3) that in overruling petitioner's motion to vacate the preliminary injunction it was not necessary for

the District Court to make findings of fact and conclusions of law.

The decision was properly so limited because

1. Petitioner's motion to vacate the preliminary injunction was based upon only two grounds, both of which went to the jurisdiction of the Court, namely: (1) that plaintiffs had not complied with the Norris-LaGuardia Act which was applicable, and (2) that there was a lack of indispensable parties because River Road employees were not joined. Petitioner cannot complain because the Court of Appeals did not consider other grounds not assigned for the motion in the District Court.

2. Petitioner as an intervener was not entitled to attack the preliminary injunction on grounds other than a lack of jurisdiction in the Court to enter it.

3. Petitioner's appeal was limited to the District Court's ruling on its motion to vacate the preliminary injunction and for an additional bond. It did not and could not appeal from the order overruling its motion for a summary judgment.

The questions, decision of which petitioner claims the Court of Appeals improperly deferred until a hearing on the merits, arose out of matters assigned by petitioner in support of its motion for a summary judgment and were not properly before the Court of Appeals.

The preliminary injunction in fact preserved the *status quo* as it had existed for more than a quarter of a century and it was eminently proper that the Court should retain the injunction and defer consideration of questions not going to its jurisdiction until a hearing on the merits.

## II.

### THE DECISION OF THE COURT OF APPEALS THAT THE NORRIS-LA GUARDIA ACT IS INAPPLICABLE TO THIS SUIT WAS PROPER AND THERE IS NO OCCASION FOR THIS COURT TO REVIEW THE SAME.

The Court of Appeals considered on its merits petitioner's contention that the Norris-LaGuardia Act is applicable to this suit, gave its reasons for its decision and then stated that in its opinion that question was settled by the decision of this Court in *Railroad Trainmen* v. *B. & O. R. Co.*, 331 U. S. 519. Petitioner cannot complain of the statement of the Court of Appeals that it believed this Court had decided the question because (1) the Court of Appeals did not treat the question as *res judicata* but reached an independent decision of the question on its merits, and (2) because the Court of Appeals could not have reasonably come to any other conclusion.

The Norris-LaGuardia Act is not applicable to this suit for the reasons set forth in plaintiffs' brief on petitioner's appeal to this Court, an excerpt from which discussing that question is set forth in an appendix to this brief. Furthermore, fundamentally and generically this case is not the type of case to which it was intended that the Norris-LaGuardia Act should apply.

## III.

### THE DECISION THAT THE RIVER ROAD EMPLOYEES ARE NOT INDISPENSABLE PARTIES AFFORDS NO GROUND FOR REVIEW BY THIS COURT.

The question as to whether River Road employees were indispensable parties was argued in this Court on petitioner's appeal. The necessary effect of this Court's decision on that appeal was to hold that River Road employees are not indispensable parties.

If the plaintiffs prevail in this suit, the River Road will need a lesser number of hours of labor and consume a lesser amount of commodities used in the operation of switch engines than would be the case if defendants prevail. It is obvious that the River Road employees, who supply the labor, stand in no different relation to this suit than would any supplier of materials who had a contract with the River Road to supply its requirements of fuel, lubricants or other commodities needed in the operation or maintenance of switch engines. Manifestly neither would be an indispensable party.

## IV.

### IT WAS NOT NECESSARY FOR THE DISTRICT COURT TO MAKE ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW IN RULING ON PETITIONER'S MOTION TO VACATE THE PRELIMINARY INJUNCTION.

The decision of the Court of Appeals is in accord with the only other decision involving a rule similar to Rule 52(a) of the Rules of Civil Procedure, which governs the question. Rule 52(a), as amended by this Court on December 27, 1946, makes it perfectly plain that no findings of fact and conclusions of law were necessary.

## V.

### PETITIONER HAS NO CAUSE TO COMPLAIN OF THE INJUNCTION BOND.

At the time it granted the preliminary injunction the Court, pursuant to the requirements of Rule 65 (2) of the Rules of Civil Procedure and 28 U. S. C. A., § 382, by order required the plaintiffs to give and in due course by order approved an injunction bond. Petitioner as an intervener could not as a matter of right demand that the bond be increased, but the court in its discretion increased the

amount of the bond so that petitioner was given more than it had a right to demand. Furthermore, there was no evidence before the District Court as to the amount of damages which the River Road trainmen might sustain by reason of the injunction.

## ARGUMENT.

### I.

### THE UNITED STATES COURT OF APPEALS DECIDED ALL QUESTIONS BEFORE IT AND PROPERLY REFUSED TO CONSIDER ISSUES NOT PRESENTED BY PETITIONER'S APPEAL.

The petitioner states eight questions which it claims are presented by its petition (pp. 7-8), assigns eight reasons for the allowance of the writ (pp. 9-11), and makes eight specifications of error (pp. 14-16). Inasmuch as the last four of said questions presented, reasons assigned and errors specified are based on the failure of the court to pass upon questions which petitioner contends it should have decided, it becomes important to consider what was properly before the Court of Appeals for decision.

A brief review of the record makes it apparent that the only question before the Court of Appeals was in substance the question whether the District Court had jurisdiction to issue the preliminary injunction. If answered in the affirmative, there was the incidental question of whether the District Court should have made findings of fact and conclusions of law in denying petitioner's motion to vacate the injunction.

There are several reasons why the questions before the Court of Appeals were so limited.

## A.

### Petitioner's Motion to Vacate the Preliminary Injunction Was Based Solely on an Alleged Lack of Jurisdiction in the Court Below, and It Was Not Entitled to Urge Other Grounds in the Court of Appeals.

Petitioner's motion to vacate the preliminary injunction was based on two grounds, both of which went directly to the jurisdiction of the court (R. 139-141). One ground was that the River Road trainmen, engineers, firemen and enginemen or their representatives were indispensable parties without which the court lacked jurisdiction to issue the injunction. The other ground was that the complaint did not comply with the provisions of the Norris-LaGuardia Act. This ground also went directly to the jurisdiction of the court.

Since petitioner's motion to vacate the preliminary injunction was based only on the two jurisdictional grounds, it cannot now complain that the Court of Appeals failed to consider other grounds not assigned in support of the motion in the District Court. *Helvering* v. *Tex-Penn Co.*, 300 U. S. 481, 498; *United States* v. *Atkinson*, 297 U. S. 157; *Pacific States Co.* v. *White*, 296 U. S. 176, 186; *Lynch* v. *United States*, 292 U. S. 571, 587; *Young* v. *Masci*, 289 U. S. 253, 261.

## B.

### Petitioner as an Intervener Was Not Entitled to Attack the Preliminary Injunction on Grounds Other Than a Lack of Jurisdiction in the Court to Enter It.

Petitioner, as an intervener, was precluded from attacking the preliminary injunction on other than jurisdictional grounds. It would seem that if a court is totally without

jurisdiction over a suit, an intervener would not be precluded from calling such matter to its attention, not as the privilege of an intervener, but because a court is bound to take notice of a total lack of jurisdiction from whatever source it may come, or even upon its own motion, and order dismissal of the suit. Beyond this, it is clear that an intervener is precluded from attacking orders or decrees entered in the case prior to intervention. *U. S.* v. *California Canneries*, 279 U. S. 553, 556; *Ex Parte Jordan*, 94 U. S. 248, 252.

The rule is clearly inferable from the opinion of this Court on petitioner's appeal, wherein it was said (331 U. S., p. 524):

> "And since he cannot appeal from any *subsequent* order or judgment in the proceeding unless he does intervene, the order denying intervention has the degree of definitiveness which supports an appeal therefrom."

The clear inference, of course, is that an intervener can appeal from or question only an order or judgment entered subsequent to his intervention. The lower federal courts have announced and followed this rule many times.*

## C.

**Petitioner's Appeal Was Limited to the District Court's Ruling on Its Motion to Vacate the Preliminary Injunction and for an Additional Bond. It Did Not and Could Not Appeal from the Order Overruling Its Motion for a Summary Judgment.**

As previously noted, aside from the question as to the amount and conditions of the injunction bond, petitioner

* *Rheinberger* v. *Security Life Ins. Co.*, 72 F. (2d) 147 (C. C. A. 7); *State of Kansas* v. *Occidental Life Ins. Co.*, 95 F. (2d) 935, 936 (C. C. A. 10); *Union Trust Co.* v. *Jones*, 16 F. (2d) 236, 239 (C. C. A. 4); *In re Veach*, 4 F. (2d) 334, 336 (C. C. A. 8).

appealed from only so much of the order of the District Court as denied its motion to vacate the preliminary injunction (R. 261-262, 288). It did not and, as a matter of fact, could not appeal from the order overruling its motion for summary judgment.*

Petitioner's claims that, properly construed, Condition 3 of the Commission's order was not violated by the change in operations enjoined by the preliminary injunction, but that if it should be held to the contrary, then 49 U. S. C. A. Section 5 (2) (f) is applicable and nullifies the Condition and the public interest requires that no injunction be issued, were all matters asserted in support of its motion for summary judgment and not in support of its motion to vacate the preliminary injunction (R. 141-142). They were, therefore, not questions properly before the Court of Appeals on petitioner's appeal. Referring to these contentions the Court of Appeals said (R. 293):

> "We do not discuss these contentions because the proper time to consider them is upon a trial upon the merits, where appellant may avail itself of any defense it may have."

For the foregoing reasons it is perfectly apparent that the Court of Appeals was merely following long established and universally accepted practice when it deferred consideration of the questions which it did not pass on until the trial on the merits.

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However, we note briefly petitioner's contention (pp. 30-33) that the court by issuing the injunction had upset the *status quo;* that the points left undecided were fundamental to the further conduct of the case; and that if any court

* An order overruling a motion for summary judgment is not a final and appealable order. *Jones* v. *St. Paul Fire & Marine Ins. Co.*, 108 F. (2d) 123, 125 (C. C. A. 5), cert. den. 305 U. S. 651; *Florian* v. *United States*, 114 F. (2d) 990, 993 (C. C. A. 7).

would take the trouble to look into them, plaintiffs would be denied relief without putting the petitioner to the expense of a trial on the merits.

In the first place, the preliminary injunction in fact restored the *status quo* as it had existed for more than a quarter of a century until the River Road trainmen through the threat of a strike that would have tied up the industrial heart of Chicago at a critical time, prevailed upon their employer, the River Road, to deny plaintiffs the right to operate their trains over its lines (R. 8).

On the sworn allegations of the complaint (R. 8), which are in no way contradicted by any affidavits of petitioner, the amount of work done by the plaintiffs' power and crews was not decreased, but was just as great after the change brought about on February 1, 1946, as it had been before that date. In other words, it was no more work for plaintiffs to spot the empty cars for loading at the Union Stock Yards' loading chutes and then remove the loaded cars from the chutes, than it was for them to switch the empty cars to an interchange yard on the River Road line (whence they were switched by the River Road crews to the loading chutes and, after loading, back to the interchange yard) and switch the loaded cars from the interchange yard to plaintiffs' own lines. The so-called settlement contract between the River Road and the petitioner was nothing more or less than a make work agreement which needlessly doubled the switching for the traffic involved in a highly congested industrial section of Chicago. Without the least compensatory advantage plaintiffs were subjected to a net increased cost of $10.96 for each loaded car handled, which was collected from them by their competitor, and at the same time that competitor deprived them of valuable terminal rights.* Furthermore,

* This Court has twice held that the Chicago Union Stock Yards are the livestock terminals of the line-haul carriers, *Atchison Ry.* v. *U. S.*, 295 U. S. 193, 195; *Union Stock Yard Co.* v. *U. S.*, 308 U. S. 213, 219.

if, as petitioner contends, the affidavits filed in connection with its motion for summary judgment are to be examined in connection with its motion to vacate the preliminary injunction, it is perfectly apparent that the sworn allegations of the complaint (R. 9-12) concerning the resulting delay in livestock shipments brought about by the change in operations on February 1, 1946, are fully borne out by the evidence taken by the Commission in the proceedings in which its order was entered (R. 200-201, 204-205, 212, 213, 215).

Under the circumstances, it seems apparent that any court would have been remiss in its duty had it not by preliminary injunction maintained the *status quo* as it had existed for so many years pending the determination of the case on its merits.

As to petitioner's suggestion that affidavits filed by it raised a doubt as to plaintiffs' interpretation of the Commission's order and for this reason the court should have vacated the preliminary injunction, it seems reasonably clear that a court would not be warranted in going beyond the Commission's interpretation of its own order in a case such as this.* But if it had considered the affidavits, it would have found that the evidence overwhelmingly supported the plaintiffs' and the Commission's interpretation (R. 198-215).†

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* *Bowles v. Seminole Rock Co.*, 325 U. S. 410, 413-414; *Illinois Comm'n.* v. *Thomson*, 318 U. S. 675, 685; *Green Valley Creamery* v. *United States*, 108 F. (2d) 342 (C. C. A. 1).

† It is, of course, elementary law that if the court had decided not to accept the Commission's interpretation of its own order, the question of the proper construction of the order could not be tried on opposing affidavits filed on a motion for summary judgment. See Federal Rules of Civil Procedure, Rule 56 (e); *Campana Corporation* v. *Harrison*, 135 F. (2d) 334, 335 (C. C. A. 7); *Toebelman* v. *Missouri-Kansas Pipe Line Co.*, 130 F. (2d) 1016, 1018 (C. C. A. 3); *Arnstein* v. *Porter*, 154 F. (2d) 464, 471 (C. C. A. 2); *Farrall* v. *District of Columbia Amateur Ath. Union*, 153 F. (2d) 647, 648 (U. S. C. A. Dist. of Col.); *Whitaker* v. *Coleman*, 115 F. (2d) 305, 306 (C. C. A. 5).

To construe Section 5 (2) (f) of the Interstate Commerce Act (49 U. S. C. A., Section 5 (2) (f)) according to petitioner's contentions (p. 31) would be to hold that Congress, after expressly authorizing the Commission to impose conditions in the public interest in approving an application under Section 5 of the Act, did in the same section authorize agreements which would nullify those conditions. It is unthinkable that Congress would do any such thing. Furthermore, such holding would be directly contrary to the decision of this Court in *Thompson* v. *Texas Mexican R. Co.*, 328 U. S. 134, 147, which decided that the jurisdiction of the Commission over the terms and conditions of trackage rights is exclusive and that not even the courts have the authority to interfere with the prerogatives of the Commission in that regard.

Petitioner's suggestion that even though the court should find that the Commission's order was violated by the change in operations on February 1, 1946, the public interest would require that no injunction issue, is novel to say the least. Section 16 (12) of the Interstate Commerce Act under which this suit is brought is mandatory in its requirements, in that it provides that if the

> "court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, *the court shall enforce obedience to such order* by a writ of injunction or other proper process, mandatory or otherwise."

Petitioner's contention, therefore, amounts to nothing more than the assertion that public interest requires that the court should refuse to perform an obligation made mandatory upon it by an Act of Congress and so deny to plaintiffs the only remedy available for the protection of valuable operating rights over the lines of the River Road which were confirmed and perpetuated by the Commission's order, and to the Commission the only remedy avail-

able for the enforcement of a condition which it was authorized to and did impose in the public interest (R. 25).*

## II.

### THE DECISION OF THE COURT OF APPEALS THAT THE NORRIS-LA GUARDIA ACT IS INAPPLICABLE TO THIS SUIT WAS PROPER AND THERE IS NO OCCASION FOR THIS COURT TO REVIEW THE SAME.

As appears from its opinion (R. 288-291), the Court of Appeals considered on its merits petitioner's contention that the Norris-LaGuardia Act is applicable to this suit, held that the cases relied on by petitioner were not in point and that under well known rules of statutory construction it was manifest that Congress did not intend that the Norris-LaGuardia Act should apply to suits brought under Section 16 (12) of the Interstate Commerce Act to enforce orders of the Commission. It then stated it believed that the question was settled by the decision of this Court on petitioner's appeal in *Railroad Trainmen* v. *B. & O. R. Co.*, 331 U. S. 519.

### A.

### The Statement in the Opinion of the Court of Appeals That It Believed This Court Had Settled the Question of the Applicability of the Norris-LaGuardia Act Affords No Ground for the Issuance of a Writ of Certiorari.

We first consider petitioner's contention (pp. 20-22) that certiorari should be granted because the Court of Appeals misconstrued this Court's decision on petitioner's appeal.

* The criterion by which the Commission is guided in imposing conditions under orders issued under Section 5 (2) of the Interstate Commerce Act is the public interest. *N. Y. Central Securities Co.* v. *U. S.*, 287 U. S. 12 (p. 24); *Texas* v. *United States*, 292 U. S. 522 (p. 530); *United States* v. *Lowden*, 308 U. S. 225, 229-230; *Smith* v. *Hoboken R. Co.*, 328 U. S. 123, 130; *Atlantic Coast Line R. Co.* v. *U. S.*, 284 U. S. 288, 295.

The Court of Appeals did not treat the question of the applicability of the Norris-LaGuardia Act as *res judicata*, but first considered the question on its merits and reached a conclusion adverse to petitioner on its own independent judgment. Having thus given independent consideration to the question, and having reached, on grounds fully stated, a decision that the Act was inapplicable, it cannot be said that its construction of this Court's decision caused it to reach a decision adverse to petitioner. At most it can only be said that its belief that this Court had settled the question reinforced its conviction that its own decision was correct.

On the record there would seem to be no possible doubt but that the belief that this Court had settled the question is well founded. As shown by its opinion, this Court fully understood the relations between petitioner and those whom it represents and the other parties to the suit. The pertinent facts were just as apparent on the record then before this Court as they are on the record now.

Furthermore the question of the applicability of the Norris-LaGuardia Act was fully argued before this Court. The petitioner there contended that the Act was applicable, that the allegations of the complaint failed to meet the requirements of the Act, and that hence no injunctive relief (the only relief authorized by Section 16 (12)) could be granted, and that the defendants were not properly defending the suit inasmuch as they had not raised that question.* Nevertheless, this Court stated (331 U. S. 519, at p. 529):

> "The instant case is a ready illustration of a judicial proceeding arising under this Act; a suit of this nature is authorized solely by Section 16 (12) of the Act."

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* See appendix to this brief for plaintiffs' discussion of the question in their brief on petitioner's appeal. For petitioner's discussion of this question, see its brief in that case, pp. 28-31, and its reply brief, pp. 18-21.

And it was held that petitioner had an unconditional right to intervene because this suit was so authorized.

This Court further held (331 U. S., at p. 531) that the River Road employees would be "bound by any judgment that might be entered in the case." This language is open to no other construction than that this Court considered that this suit was properly brought under Section 16 (12) and that the court had jurisdiction thereunder to grant the only type of relief provided for by that section, namely, injunctive relief, particularly since on every appeal to it the first and fundamental question is that of jurisdiction, not only of this Court, but also of the court from which the record comes. Thus in *M. C. & L. M. Railway Co.* v. *Swan*, 111 U. S. 379, this Court, in holding that the court below did not have jurisdiction to hear the case, although the question was not presented to this Court by either party, said (p. 382):

> "* * * the rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this court, *of its own motion*, to deny its own jurisdiction, *and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction*, first, *of this court, and then of the court from which the record comes.* This question the court is *bound* to ask and answer for itself, *even when not otherwise suggested, and without respect to the relation of the parties to it.*"

In *Great Southern Fire Proof Hotel Co.* v. *Jones*, 177 U. S. 449; *Kentucky* v. *Powers*, 201 U. S. 1; and *Chi., B. & Q. Ry. Co.* v. *Willard*, 220 U. S. 413, this Court quoted in full and followed the above quoted language from the *Swan case.*

It would therefore seem that the doctrine of the *Swan case* was clearly applicable to this Court's decision on petitioner's appeal and that it was futile to contend now that the question of jurisdiction was not disposed of by this Court's earlier decision.

Petitioner suggests (p. 22) that the complaint also seeks damages apparently in the belief that this would explain the allowance of the intervention even though the Norris-LaGuardia Act applied. However, this Court held in terms that the suit would lie under Section 16 (12) of the Interstate Commerce Act and it is clear that it would not have lain as a suit for damages for lack of diversity of citizenship (R. 2-3).

If petitioner's contention that the Norris-LaGuardia Act is applicable to this case is correct, not only did jurisdiction not affirmatively appear on the record but lack of jurisdiction affirmatively appeared. Since the very idea of intervention implies the existence of a suit in a court of competent jurisdiction in which intervention may be had,* the decision of this Court that petitioner was entitled to intervene in this suit necessarily presupposed that this was a suit of which the District Court had jurisdiction.

It can hardly be supposed that this Court would have engaged in an act so frivolous as the issuance of its mandate to the court below directing that it permit petitioner to intervene in a suit of which it had no jurisdiction, or that it intended to put the parties litigant to the expense of carrying this suit before it a second time before even reaching a hearing on the merits in order that the basic question of the jurisdiction of the District Court to entertain it could be authoritatively decided.

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* *Texas Cement Co.* v. *McCord*, 233 U. S. 157, 163; *A. Bryant Co.* v. *N. Y. Steam Fitting Co.*, 235 U. S. 327, 337, 338, 342; *Kendrick* v. *Kendrick*, 16 F. (2d) 744, 745 (C. C. A. 5) (cert. den. 273 U. S. 758); *Pianta* v. *H. M. Reich Co.*, 77 F. (2d) 888, 890 (C. C. A. 2); and *Godfrey L. Cabot, Inc.* v. *Binney & Smith Co.*, 46 F. Supp. 346, 347.

Manifestly, the Court of Appeals reached the only reasonably tenable conclusion when it said (R. 291), "If the District Court was without jurisdiction, the Supreme Court would have said so."

## B.

### The Court of Appeals Properly Held the Norris-LaGuardia Act Not Applicable to This Suit and There Is No Decision by Any Federal Court Which in Any Way Conflicts With Its Decision.

We shall not burden this Court with another discussion of the question of the applicability of the Norris-LaGuardia Act to this suit. We have printed as an appendix to this brief that portion of plaintiffs' brief as appellees on petitioner's appeal to this Court in which that question was discussed and the cases then relied on by petitioner distinguished. The case of *East Texas Motor Fr. L.* v. *International Brotherhood, Etc.*, 163 F. (2d) 10, also relied on by petitioner here, is practically identical on its facts and holdings with *Lee Way Motor Freight* v. *Keystone Freight Lines*, 126 F. (2d) 931, which we there considered. It adds nothing to that case and is distinguishable from the instant case on the same grounds.

It should be apparent on a moment's reflection that fundamentally and generically this is not the type of case to which it was intended that the Norris-LaGuardia Act should apply. The question here involved is highly important from the standpoint of the plaintiffs, the defendant carriers and the public at large. As to the traffic involved, it is the question whether the plaintiffs are to continue to have the immensely valuable right of operating their trains directly between their own lines and the Union Stock Yards' loading chutes for a small trackage charge or whether the defendant carriers can deprive them of termi-

nal facilities at those yards which they have always enjoyed, and introduce two utterly needless switching operations in the handling of their cars at an additional cost to them of approximately $11.00 per car with no resulting saving in hours of service of power or crews but with a consequent delay in the handling of the livestock to the detriment of both the plaintiffs and the public. Such is the question at issue in this suit. By Section 16 (12) of the Interstate Commerce Act Congress has made available an orderly method by which the rights of the plaintiffs, the defendant carriers and the public as represented by the Commission are required to be determined and enforced according to their merits and the law of the land. Yet petitioner, representing trainmen whose only interest in the questions is whether or not they shall have or be denied the privilege of doing as trainmen the work incidental to the two needless switching operations, insists that under the Norris-LaGuardia Act the court is powerless to entertain the suit and to enforce as against them its decision in the premises. It is respectfully submitted Congress did not intend by that Act to set apart petitioner and those whom it represents and place them above and beyond the law by which the rights of ordinary litigants and the public are to be determined.

## III.

### THE DECISION THAT THE RIVER ROAD EMPLOYEES ARE NOT INDISPENSABLE PARTIES AFFORDS NO GROUND FOR REVIEW BY THIS COURT.

Petitioner cites no authority to support its contention (pp. 25-27) that River Road employees are indispensable parties to this suit.

Section 16 (12) of the Interstate Commerce Act provides that the injunction shall run against the offending carrier

and "its officers, agents, or representatives." Rule 65 (2) of the Rules of Civil Procedure provides that injunctions issued pursuant thereto shall be binding "upon the parties to the action, their officers, agents, servants, employees and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." Both the statute and Rule recognize the elementary rule of law that an injunction may issue against and be binding on the agents and employees of a party without their being made parties to the suit, because to hold otherwise would enable a defendant to nullify the decree by carrying out the prohibited acts through its agents, servants or employees, or those identified with it. *Chase National Bank* v. *Norwalk*, 291 U. S. 431, 436, 440; *In re Lennon*, 166 U. S. 548, 554.

The plaintiffs in asking and the court in granting an injunction against the River Road employees merely followed the required procedure.

On its appeal to this Court, petitioner argued that the River Road employees were indispensable parties and plaintiffs argued to the contrary. As pointed out by the Court of Appeals (R. 291), an indispensable party is one without whom the court can do nothing. This Court has many times so held.* Nevertheless, this Court did not hold that the River Road employees were indispensable parties. To the contrary, it clearly held that the court could go on without them, stating (331 U. S. 531) that they "would be bound by any judgment that might be entered in the case," also "Whether the employees' interests should be asserted or defended in a proceeding where those interests are at stake is a question to be decided by the employees' representative, not by the court."

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* *Shields* v. *Barrow*, 17 How. 130, 144; *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199, 247; *Niles-Bement Co.* v. *Iron Moulders Union*, 254 U. S. 77, 80.

Petitioner is a party to this suit because this Court held in effect that it was dispensable, that the River Road trainmen would be bound by any judgment which would be entered in the suit, and therefore, under Section 17 (11) of the Interstate Commerce Act, it was entitled to intervene to protect their interests if it wished. This conclusion could hardly be plainer if this Court had spelled it out in so many words.

The only interest the River Road trainmen have in this suit is in their claimed right to do the trainmen's work in the two additional switching movements brought about by the change in operations on February 1, 1946. If the plaintiffs and the Commission should prevail on the merits, that work will not be done by the River Road trainmen or by anybody else. If the River Road should do that work, it would require more hours of labor from its trainmen, more coal, more lubricants, and more of all the variety of supplies needed in the maintenance and operation of switch engines. Any supplier who had a contract with the River Road to supply the coal, the oil, or any other of the commodities consumed in such maintenance and operation would have just as sound a basis for asserting that he is an indispensable party to this suit as the petitioner has, because the River Road would use less coal, less oil, and less of any other such supplies just as well as less labor if it did not do the work. Yet no one would attempt for a moment to sustain the claim of such supplier that he was an indispensable party.

Petitioner's claim (p. 26) that Rule 65 (e) of the Rules of Civil Procedure is deprived of its vitality by the holding that it is not an indispensable party is utterly groundless. The only pertinent portion of that rule is to the effect that the Rules of Civil Procedure do not modify the provisions of the Clayton or the Norris-LaGuardia Acts. The fact that those acts are not applicable to this suit disposes of petitioner's contention.

It might be noted in passing that, though this Court has permitted petitioner to intervene in this suit, its efforts to date have been devoted to preventing a hearing on the merits of the case, and the other employees have not even availed themselves of their right to intervene.

## IV.

### THE COURT OF APPEALS PROPERLY HELD THAT IT WAS NOT NECESSARY FOR THE DISTRICT COURT TO MAKE ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW IN OVERRULING PETITIONER'S MOTION TO VACATE THE PRELIMINARY INJUNCTION.

Petitioner's contention (pp. 27-30) that the Court of Appeals has limited the application of Rule 52 (a) of the Rules of Civil Procedure so as to destroy its purpose is wholly untenable.

The pertinent parts of Rule 52(a) now provide:

> "* * * in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. * * * *Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).*"

The italicized language was added by the amendment to the rule adopted by this Court on December 27, 1946.

Before such amendment, Rule 52(a), in so far as pertinent here, was the same as Equity Rule 70½. In *Munoz v. Porto Rico Ry. Light & Power Co.*, 83 F. (2d) 262 (C. C. A. 1), cert. den. 298 U. S. 689, it was held that Equity Rule 70½ did not apply to a motion to dissolve a preliminary injunction. Petitioner has cited no authority to the contrary.

If there were any possible doubt about the matter, the recent amendment to the rule has removed it by providing

that such findings and conclusions "are unnecessary on decisions of motions under Rules 12 or 56 *or any other motion* except as provided in Rule 41(b)," which latter rule is in no way pertinent here. This being true, it is, perhaps, unnecessary to point out the error in petitioner's contention that many new questions were raised by its motion to vacate the preliminary injunction and that in the absence of further findings of fact and conclusions of law, the Court of Appeals could not know and review the grounds for the District Court's rulings. We have previously shown that the only two grounds assigned by petitioner for its motion to dissolve the preliminary injunction went to the jurisdiction of the court. The overruling of petitioner's motion was necessarily based upon a finding that the court had jurisdiction. The question of the District Court's jurisdiction was fully considered by the Court of Appeals.

## V.

### PETITIONER HAS NO CAUSE TO COMPLAIN OF THE INJUNCTION BOND.

Rule 65 (2) of the Rules of Civil Procedure following 28 U. S. C. A., Section 382, provides in substance that no temporary injunction, etc., shall issue "except upon the giving of security by the applicant, *in such sum as the court deems proper*" for the payment of such damages as may be sustained by any party who is found to have been wrongfully enjoined.

At the time of granting the preliminary injunction, the court ordered plaintiffs to file a bond for $10,000 conditioned as required by the rule and statute (R. 67), and a bond in that amount was filed and approved by the court on the same day (R. 68-70). It was the view of the District Court that an intervener takes the case as he finds it and cannot attack prior orders of the court, but that, even in

the absence of any intervention, the court had power at any time in its discretion to require additional security of plaintiffs and so directed plaintiffs to file additional security for the benefit of the River Road trainmen in the amount of $25,000 to become effective as of the date the motion for additional security was presented to him (R. 230-231). Even had the additional bond been given pursuant to the requirements of the rule and statute above mentioned, the amount thereof would have been very largely in the discretion of the court. *Detroit Trust Co.* v. *Campbell River Timber Co.*, 98 F. (2d) 389, 393 (C. C. A. 9).

Furthermore, petitioner submitted no evidence as to the amount of damages which the River Road trainmen might sustain by reason of the injunction. Attached to the motion to vacate the preliminary injunction, etc., was an affidavit (R. 146) alleging that the trainmen, engineers, firemen and enginemen "are losing work to which they are entitled and wages therefor believed to be in excess of $200.00 per day." Not only is this statement merely on *belief* but it does not appear whose belief is involved, for it is not alleged to be the belief of the affiant. Also, since the belief applies collectively to all four classes of employees, of which the trainmen are only one, there is no way by which it can be determined what portion of the "believed" $200.00 per day loss was believed sustained by the trainmen as distinguished from the other employees.

Again, these allegations are entirely insufficient to show that any trainmen then employed by the River Road and represented by the petitioner did sustain any loss through the enforcement of the plaintiffs' rights to operate over the River Road. The allegation is made that the employees represented by petitioner are being deprived of particular work that they are entitled to, but it is not alleged that any such employees were not then working full time and, therefore, could do the work in question if permitted to do it.

In its discretion, the District Court gave the petitioner more than it was entitled to as a matter of right and it should not be heard to complain in this Court.

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For the foregoing reasons, it is respectfully submitted that the petition of the Brotherhood of Railroad Trainmen, intervening defendant, for a writ of certiorari should be denied.

Respectfully submitted,

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March 11, 1949.

# APPENDIX.

EXCERPT FROM BRIEF OF PLAINTIFFS-APPELLEES IN THE SUPREME COURT OF THE UNITED STATES IN THE CASE OF BROTHERHOOD OF RAILROAD TRAINMEN, APPELLANT, *vs.* BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., PLAINTIFFS-APPELLEES; INTERSTATE COMMERCE COMMISSION, INTERVENING PLAINTIFF-APPELLEE; THE CHICAGO RIVER AND INDIANA RAILROAD COMPANY, ET AL., DEFENDANTS-APPELLEES, No. 970, OCTOBER TERM, 1946 (pp. 54-62).

## A.

**The contention that the Norris-LaGuardia Act prohibits the court from enforcing the order of the Commission is frivolous.**

The Norris-LaGuardia Act provides that no court of the United States shall have jurisdiction to issue any injunction "in a case involving or growing out of a labor dispute" except in conformity with the Act, and that no injunction shall "be issued contrary to the public policy declared" in the Act. 29 U. S. C. A. Section 101.

**(1) THIS SUIT DOES NOT INVOLVE AND DID NOT GROW OUT OF A LABOR DISPUTE.**

This suit grows out of the refusal of the defendants to obey the order of the Commission requiring them to continue the right of the plaintiffs to operate their cars to and from the Union Stock Yards over the line of the defendant River Road. Under the specific provisions of paragraph (12) of Section 16 of the Interstate Commerce Act the failure of the defendants to obey that order gave rise to the cause of action which plaintiffs have stated in their

complaint in this suit. Furthermore, upon proof of the breach of that order, the court is commanded to issue an injunction enforcing it. The duty to obey the order is absolute unless and until it is set aside by a court of competent jurisdiction or is vacated or modified by the Commission itself. Neither the plaintiffs nor the court are in any way concerned with the considerations which might have influenced the defendants to commit a breach of the order. Such factors have no bearing on the plaintiffs' right to maintain this suit and are not pertinent to any issue presented by it. The suit therefore does not involve and did not grow out of a labor dispute. It involves and grows out of a violation of the Commission's order.

**(2) A FUNDAMENTAL RULE OF STATUTORY CONSTRUCTION FORBIDS THE APPLICATION OF THE NORRIS-LaGUARDIA ACT TO THIS SUIT.**

The Norris-LaGuardia Act (29 U. S. C. A. Secs. 101-115) was enacted March 23, 1932. It is broad in its scope and deals with situations having an almost infinite variety of aspects and arising anywhere in the field of labor relations.

Paragraph (12) of Section 16 of the Interstate Commerce Act, under which plaintiffs brought this suit, has been twice amended and as so amended reenacted since the passage of the Norris-LaGuardia Act. It was amended on April 9, 1935 (c. 498, Sec. 1, 49 Stat. 543) and again on September 18, 1940 (c. 722, Title I, Sec. 11(a), (b) 54 Stat. 912, 913). As so last amended and reenacted it provides (49 U. S. C. A. Sec. 16 (12)):

> "If any carrier fails or neglects to obey any order of the commission other than for the payment of money, while the same is in effect, the Interstate Commerce Commission or any party injured thereby, or the United States, by its Attorney General, may apply to

> any district court of the United States of competent jurisdiction for the enforcement of such order. If, after hearing, such court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, such court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it or them obedience to the same."

This section deals with a very limited field and is definite and specific in its requirements. An order of the Commission duly made and valid, as the order in this case has been decreed to be, has the force and effect of law. Paragraph (12) is definite, specific and mandatory in its direction as to how such order shall be enforced.

It is a fundamental rule of statutory construction that statutes dealing with special and restricted subject matters are not affected by statutes of broad and general application unless they are specifically mentioned therein.

In *Virginian Ry. Co.* v. *Federation*, 300 U. S. 515, the court had issued an injunction which, among other things, commanded the railway company to treat with the representatives of its employees, a duty imposed upon it by Sec. 2, Ninth, of the Railway Labor Act (45 U. S. C. A. Sec. 152, Ninth). To the objection that the Norris-LaGuardia Act had not been complied with, this Court, speaking through Mr. Justice Stone, said (p. 563):

> "It suffices to say that the Norris-LaGuardia Act can affect the present decree only so far as its provisions are found not to conflict with those of § 2, Ninth, of the Railway Labor Act, authorizing the relief which has been granted. *Such provisions cannot be rendered nugatory by the earlier and more general provisions of the Norris-LaGuardia Act.* See the *Railway Clerks* case, *supra*, 571; (281 U. S. 548) cf. *Callahan* v. *United*

*States*, 285 U. S. 515, 518; *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, 22; *International Alliance* v. *Rex Theatre Corp.*, 73 F. (2d) 92, 93."

In fact the rule that a general statute will not affect a special statute also applies in the case where the special statute is prior in time to the general statute. Thus in 59 Corpus Juris, Statutes, it is said (p. 1057):

> "It is a fundamental rule that where the general statute, if standing alone, would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute, whether it was passed before or after such general enactment. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special statute will be construed as remaining an exception to its terms, *unless it is repealed in express words or by necessary implication.*"

The same rule is stated in 50 American Jurisprudence, Statutes, p. 564.

In *Rodgers* v. *United States*, 185 U. S. 83, this Court said (p. 87):

> "It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general—the terms of the general broad enough to include the matter provided for in the special—the fact that the one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special."

After quoting from decisions in a number of other cases, this Court continued (p. 88):

> "In Black on Interpretation of Laws, 116, the proposition is thus stated:
>
> " 'As a corollary from the doctrine that implied repeals are not favored, it has come to be an established rule in the construction of statutes that a subsequent act, treating a subject in general terms and not expressly contradicting the provisions of a prior special statute, is not to be considered as intended to affect the more particular and specific provisions of the earlier act, unless it is absolutely necessary so to construe it in order to give its words any meaning at all.'
>
> "So, in Sedgwick on the Construction of Statutory and Constitutional Law, the author observes, on page 98, with respect to this rule:
>
> " 'The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms or treating the subject in a general manner and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, *unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all.*' "

The above case has been often cited and followed by this Court. See, *e. g.*, *Washington* v. *Miller*, 235 U. S. 422, 428; *United States* v. *Berkeness*, 275 U. S. 149, 155-156.

Certainly it is not absolutely necessary, in order to give the provisions of the Norris-LaGuardia Act any effect, to so construe it as to prevent a court of the United States from enforcing by injunction an order of the Interstate Commerce Commission which it is specifically commanded to do by the provisions of said paragraph (12). Yet, according to this Court, unless there is such necessity, paragraph (12) must stand as an exception to the Norris-LaGuardia Act.

**(3) THE NORRIS-LaGUARDIA ACT IS NOT APPLICABLE TO THE UNITED STATES WHICH, ACTING THROUGH THE INTERSTATE COMMERCE COMMISSION, IS ASKING FOR THE ENFORCEMENT OF THE COMMISSION'S ORDER.**

In *United States* v. *United Mine Workers of America*, ..... U. S. ....., 67 S. Ct. 677, this Court held that the Norris-LaGuardia Act was not applicable to the United States, saying (p. 686):

> "There is an old and well-known rule that statutes which in general terms divest preexisting rights or privileges will not be applied to the sovereign without express words to that effect."

As previously pointed out, the Interstate Commerce Commission filed an intervening complaint in this suit on February 21, 1946, within nine days after the complaint of the plaintiffs was filed, in which it charged that the defendants were violating its order of May 16, 1922, and Condition 3 thereof, and in which it prayed for a preliminary and a permanent injunction "restraining and enjoining the defendants and each of them, their respective officers, agents, representatives, servants, employees and successors from (a) failing and neglecting to obey said order of the Commission of May 16, 1922," and from "(b) violating condition 3 of said order of the Commission of May 16, 1922." (R. 47-49.)

As previously pointed out, paragraph (12) of Section 16 of the Interstate Commerce Act specifically gives the Commission authority to apply to the appropriate District Court of the United States for the enforcement of its orders. In its complaint the Commission alleged that Section 5 (8) of the Interstate Commerce Act (49 U. S. C. A. Sec. 5 (8)) gives the court jurisdiction to award the relief prayed for by it (R. 49).

Section 5 (8) provides:

> "The district courts of the United States shall have jurisdiction upon the complaint of the Commission, al-

leging a violation of any of the provisions of this section or disobedience of any order issued by the Commission thereunder by any person, to issue such writs of injunction or other proper process, mandatory or otherwise, as may be necessary to restrain such person from violation of such provision or to compel obedience to such order."

Section 5 (8) was first enacted as Section 5 (13) by the Act of June 16, 1933 (more than one year after the enactment of the Norris-LaGuardia Act) (c. 91, Title II, Sec. 202, 48 Stat. 217-220), and was amended and renumbered as Section 5 (8) by the act of September 18, 1940 (c. 722, Title I, Sec. 7, 54 Stat. 905).

That the Commission is an arm of the United States Government to which Congress has, by the Interstate Commerce Act, delegated certain of its sovereign powers, cannot be doubted. *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 426, 427; *Inter-Mountain Rate Case,* 234 U. S. 476, 486.

Nor can it be doubted that in entering the order of May 16, 1922, and in seeking its enforcement, it is exercising such delegated powers of sovereignty. *N. Y. Central Securities Co.* v. *U. S.,* 287 U. S. 12; *Texas* v. *U. S.,* 292 U. S. 522; *Thompson* v. *Texas Mexican R. Co.,* 328 U. S. 134.

There is obviously no legitimate reason why the Norris-LaGuardia Act should be a bar to a suit brought by the Interstate Commerce Commission to enforce its order if, as is this case, it would be no bar had the suit been brought by the Attorney General in the name of the United States. Either the Commission or the Attorney General is authorized to bring such suit under paragraph (12) of Section 16 of the Interstate Commerce Act.

Furthermore, the rules of statutory construction above discussed are peculiarly applicable to a suit brought by the Commission under Section 5 (8), first enacted after the passage of the Norris-LaGuardia Act, and being limited in

its scope to the enforcement of orders issued under Section 5 of the Interstate Commerce Act, under which section the order here involved was entered.

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Therefore, for three reasons, each of which in and of itself is sufficient in the premises, the Norris-LaGuardia Act is not applicable to the present suit. These reasons are, (1) the suit does not arise or grow out of a labor dispute; (2) even if it did, a fundamental rule of statutory construction forbids the application of the Act to this suit; (3) the Norris-LaGuardia Act is not applicable to the United States which, acting through the Commission, is asking for the enforcement of the order.

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**(4) THE CASES CITED BY APPELLANT DEALING WITH THE NORRIS-LaGUARDIA ACT HAVE NO APPLICATION.**

In view of the foregoing considerations, only brief notice need be given to the cases cited by appellant (Br. pp. 29-31) in support of its position that the Norris-LaGuardia Act is applicable to this suit.

The case of *Trainmen* v. *Tol., P. and W. R. Co.*, 321 U. S. 50, simply holds that the Norris-LaGuardia Act prevents a railroad from procuring an injunction restraining violence on the part of its striking employees where it has not fully complied with the requirements of the Railway Labor Act (45 U. S. C. A. Secs. 151-164). That case is in no way applicable here.

*Southeastern Motor Lines* v. *Hoover Truck Co.*, 34 F. Supp. 390 (Dist. Ct., M. D. Tenn.), and *Lee Way Motor Freight* v. *Keystone Freight Lines*, 126 F. (2d) 931 (C. C. A. 10), are likewise inapplicable. In both cases the plaintiffs, who were motor carriers, were engaged in labor disputes with their own employees and their places of busi-

ness were being picketed. Connecting motor carriers who customarily interchanged freight with plaintiffs had contracts with their employees which provided that they would not be required to cross picket lines. In each case the plaintiff sued to compel the connecting motor carriers to continue to interchange freight with it. Mandatory injunctions were refused because a labor dispute was involved within the meaning of the Norris-LaGuardia Act. In both cases there were labor disputes between the plaintiffs and their own employees which had resulted in strikes, and the employers were seeking the aid of the general equity powers of the court to break the strikes. This is precisely what the Norris-LaGuardia Act prohibits. None of the three above mentioned considerations making the Norris-LaGuardia Act inapplicable to this suit obtained in either of those cases.